letter P.1 to the State Secretary. This led to the police investigation for corruption, hence the original charge under the Prevention of Corruption Act. But for reasons which need not detain me here it was subsequently decided to amend the charge to one of cheating upon the assumption — the wrong assumption — that the complainant had been deceived when in fact he was not. Whether the appellant had committed any other offence in law is not a matter for me to say. But, as far as this appeal is concerned, it must for the reasons already stated be allowed. There will, therefore, be an order that the conviction be quashed and sentence set aside.

Conviction quashed and sentence set aside.

Solicitors: *Mendis & Loh.*

PAHANG LIN SIONG MOTOR CO. LTD. & ANOR. v. KARTAR KAUR & ANOR.

[F.C. (Azmi C.J. (Malaya), Ong Hock Thye & Suffian F.JJ.) November 4, 1968]

[K.L. — Federal Court Civil Appeal No. X.32 of 1968]

Negligence — Highway — Accident — Bus encroaching on to path of oncoming car — Conflicting evidence — Cause of accident — High speed and violent braking — Car going out of control before accident — Claim for damages.

Damages — Claim for — Whether there was contributory negligence — Deprivation of damages.

This was an action by the legal representatives of one *K.S.* deceased against the appellants, the owners and driver of an omnibus, for negligence as a result of which the deceased was killed. At the trial the High Court held the appellants liable for negligence, and the deceased was found guilty of contributory negligence to the extent of 25%. On appeal it was contended that the deceased was entirely to blame for the accident.

There were only two witnesses to the accident, one *S* a clerk of the deceased who was in the car with the deceased and the other the driver of the omnibus. Both witnesses gave conflicting evidence and the learned trial judge opted in favour of the evidence of *S* and held that the omnibus "swerved to the middle of the road when negotiating the bridge and thereby encroached into the path of the oncoming car. It was therefore the negligence of the appellant driver which caused the accident".

Held, allowing the appeal: (1) the negligent encroachment by the bus on its wrong side of the road was in the circumstances not necessarily the only possible explanation for the car going out of control nor the most probable as the term "unthinkable" referring to alternative causes would imply;

(2) after consideration of all the circumstances the unfortunate accident was in all probability due to a combination of two factors, i.e., high speed and violent braking at the bend due to an error of judgment by the deceased.

Case referred to:—

(1) *Yuill* v. *Yuill* [1945] P. 15, 19-20.

FEDERAL COURT.

T.S. Tan for the appellants.

T.S. Sidhu for the respondents.

K.L. Hee for A. Subramaniam.

Cur. Adv. Vult.

Ong Hock Thye F.J.: At about 8.30 a.m. on June 16, 1964 the late Mr. Kehar Singh, an advocate and solicitor practising in Kuala Lumpur, was driving his car, a Mercedes Benz 190D, from Rawang towards Kuala Lumpur, with Mr. Subramaniam his clerk seated beside him, when the car came into violent collision with an oncoming motor omnibus in the vicinity of a bridge at the 12½ mile. Mr. Kehar Singh died the same afternoon of shock and haemorrhage from fractured ribs and laceration of the left lung. Mr. Subramaniam suffered lesser injuries.

In actions brought respectively by the legal representatives of Mr. Kehar Singh and by Mr. Subramaniam, which were consolidated at the trial, it was held that the appellants, the owners and driver of the omnibus were liable for negligence, but that Mr. Kehar Singh himself was also contributorily negligent to the extent of 25%. Judgment was accordingly given against the appellants for 75% of the amount of agreed damages. It is now argued that on the evidence, Mr. Kehar Singh was entirely to blame.

Only two witnesses gave evidence at the trial, Mr. Subramaniam for the plaintiffs and the driver of the omnibus for the defendants. Their evidence was, however, supplemented by an agreed bundle of documents, consisting of the Road Transport examiner's report of the damage sustained by the two vehicles, a police report made by the appellant driver at Rawang less than an hour after the accident, a sketch plan made by police inspector Mohamed Tahir of the scene of accident, 6 photographs taken at the same time and the evidence recorded at an inquiry held by a magistrate on October 13, 1964 under the provisions of Chapter XXXII of the Criminal Procedure Code. It may be noted that both the trial witnesses had given evidence at the enquiry within 4 months, while their recollections of the accident were still fresh.

It was the plaintiffs' case that, while the vehicles were approaching the bridge from opposite directions, the omnibus, which had been travelling in a normal manner, swerved as it entered the bridge, into the path of the oncoming car, leaving Mr. Kehar Singh no choice but to apply his brakes violently, as a result of which his car skidded and crashed into the omnibus.

The defendants' case, on the other hand, was that, after Mr. Kehar Singh had taken a bend at high speed, some 50 to 60 yards before the bridge, his car began to pursue an erratic course as it approached the bridge and, notwithstanding that the bus swerved towards the grass verge on its left to avoid a collision, the car crashed into it.

Faced with these two conflicting stories the learned trial judge felt he had to make up his mind on the probabilities. In the result he opted in favour of Mr. Subramaniam's version. The reason why he did so seems to me unmistakable for he said:—

"The stretch of road leading towards the bridge was straight and dry on the day of the accident and it is unthinkable that the deceased's car could have behaved *in the manner described by both parties* unless there was something on the road which made it react in such a manner."

He then went on to hold as a fact that the omnibus "swerved to the middle of the road when negotiating the bridge and thereby encroached into the path of the oncoming car. It was therefore the negligence of the defendants which caused the accident."

As regards Mr. Kehar Singh's share of blame the learned judge said:—

"It is sufficient to conclude as a matter of inference that, in view of the severe damage to the car, it was travelling at an excessive speed. If the deceased had driven his car at a reasonable speed he would have been able to mitigate or avoid the accident. I would assess his liability at 25%."

In my opinion, it is implicit in the first of the two excerpts quoted above, that the learned judge accepted as true, because it was vouched for by both sides, that the car went out of control before the collision. He further found as a fact that the car was travelling at "an excessive speed" notwithstanding that Mr. Subramaniam had testified that the car was doing only 30 to 35 m.p.h., which could by no means have been termed "excessive" on the open road. Indeed, it appears to have been conceded by counsel for the plaintiffs, or at least not seriously disputed, that Mr. Kehar Singh was probably driving at an excessive speed.

Accordingly there were two primary facts found which were not open to dispute, namely, the car going out of control on approaching the bridge and its excessive speed. The reason why the car went out of control was clearly a matter of inference and the grounds for such inference were as follows:—

"It was said on behalf of the plaintiffs that since the driver of the bus could not see the nearside of his vehicle well in view of its size — and that is admitted by the driver — it was necessary for him to drive his vehicle more to the right in order to negotiate the bridge safely, and in doing so the bus encroached into the path of the oncoming car. In the circumstances the deceased could do nothing but jam on his brakes, so that his vehicle skidded and went out of control and finally crashed into the bus . . . . To my mind that is a reasonable proposition, and after giving the most careful consideration I have no hesitation in accepting that the probabilities favour such an inference."

Then followed the passage quoted in the first excerpt above, from which it would appear that no other probable cause for the car going out of control deserved to be seriously entertained.

With the greatest respect, I am compelled to voice my dissent, for the simple reason that negligent encroachment by the bus on its wrong side of the road was, in the circumstances, not necessarily the only possible explanation for the car going out of control, nor the most probable, as the term "unthinkable", referring to alternative causes, would imply.

In the first place, the alleged encroachment rested entirely on the evidence of Mr. Subramaniam, which was strongly disputed by the appellant driver. Of the former this may be said. His evidence as to the speed of the car had obviously been disbelieved by the judge who held that, in fact, it was excessive, and he further agreed, in cross-examination, that his account of the collision was not borne out by the plan. Such being the case, it seems to me that:—

"an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by a trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

(see judgment of Lord Greene M.R. in *Yuill* v. *Yuill* [1]).

When pressed to explain why the omnibus should have moved as alleged, the witness said:—

"I do not know why the bus swerved to the wrong side and encroached on our way. I cannot give any reason why the bus swerved to the wrong side in order to cross the bridge."

On the other hand, there was evidence on the record that the appellant driver had been driving this particular omnibus for 3 to 4 years. Although an admission from him was elicited that "it was difficult to judge distance between the nearside of the bus and the edge of the road," he had gone on, by way of qualification, to explain that he "had to pass many bridges on the way to Kuala Kubu Bahru." Furthermore, the argument of plaintiffs' counsel took no account of the fact that, apart from considerable driving experience over the same route, the driver could plainly, see the road in front of the bonnet well enough to avoid the centre line and, in view of the width of road surface, must have known that he could give the near-side bridge railings a wide berth without having to encroach as alleged. For the above reasons, I think that the evidence of Mr. Subramaniam should not have been accepted, as it was, without reservation.

In the second place, was not the excessive speed of the car itself, when taking the bend, the more probable cause for its going out of control? Both at the inquiry before the magistrate and at the trial the appellant driver's evidence was that after the car came out of the bend at speed it proceeded to zig-zag. Indeed it was common

ground that the car went out of control just before the accident. The crucial issue was why? On the one hand, Mr. Subramaniam could not offer any reasonable explanation for the omnibus swerving off its normal course, which caused Mr. Kehar Singh to brake. In default of such explanation it was at least highly probable that Mr. Kehar Singh could have lost control for other reasons requiring careful consideration before they were eliminated. Assuming, for the sake of argument, that the appellant driver's story was true, what could have happened? At their respective speeds and distances from the bridge it is obvious that the vehicles should have to pass each other at or very near the bridge. There was good visibility on both sides of the bridge over a considerable distance. Hence Mr. Kehar Singh could not have failed to notice the approaching omnibus before he came to the bend. Having seen it, was he likely to contemplate meeting this huge vehicle at the same speed of travel within the limited confines of the bridge railings as he would on the open road? Or would he reduce speed? If, as I think, the latter course seemed the more likely, then his speed before and on taking the bend must be considered. It was stated by Mr. Subramaniam that Mr. Kehar Singh "applied his brakes with great force." This could very well have taken place, upon the omnibus being sighted, either at the bend itself or before the car was in a position to resume a straight course. It is common knowledge and experience among motorists that forceful application of the brakes when taking a bend at speed tends to cause skids and loss of control. In this case the residual speed of the car, even after braking, must have been still very high, to account for the broken bridge railing and the guide-stone (P.1 on the plan) being carried into the stream. Hence its speed at the bend could have been little short of the maximum.

After consideration of all the circumstances therefore, I am of opinion that the unfortunate accident was in all probability due to a combination of two factors, high speed and violent braking at the bend due to an error of judgment by Mr. Kehar Singh. With the greatest respect, I do not share the view that an experienced omnibus driver could have deliberately done anything so unaccountable and dangerous as to encroach on the path of an oncoming car merely in order to give the near-side bridge railings a wider berth.

With regard to the plan made by the investigating officer I must say that, making due allowances for its not having been drawn according to scale, the fact remains that, on material points, it supports the version given by the appellant driver. The collision could only have taken place close to where the two men in the car were ejected through their respective doors. The brake marks of the omnibus are also significant as showing a desperate attempt by the appellant driver, from well within his own half of the road, at the Rawang end of the bridge, to clear the whole roadway for the car by going on the grass himself, even if he had to knock down a guide-stone while doing so.

To conclude assuming that I am wrong in my judgment, it is my view that even on the balance of probabilities, which is the standard of proof in such cases, the onus of proof has not been discharged by the plaintiffs; *non sequitur* that, because the car went out of control and there must have been a cause, it necessarily followed that the reason given by Mr. Subramaniam should have been accepted as an inevitable conclusion.

I deeply regret that my judgment will deprive a bereaved family of the poor solatium of even the small monetary compensation they have been awarded, but hard cases make bad law.

For my part I would allow this appeal, since no case of negligence has been made out against the appellant driver.

Azmi C.J. (Malaya) and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Allen & Gledhill; Khoo & Sidhu; Mahendra & Hee.*

NG v. LIM

[F.C. (Tan Ah Tah F.J., Chua and Choor Singh JJ.) November 16, 1968]

[Singapore — Federal Court Civil Appeal No. Y.19 of 1968]

Family Law — Divorce — Cruelty — Proof beyond reasonable doubt — Finding of trial judge — Onus on appellant.

This was an appeal against the decision of Buttrose J. ([1968] 2 M.L.J. 100) who pronounced a *decree nisi* for the dissolution of the marriage between the parties. The learned trial judge had found that the appellant had been guilty of the matrimonial offence of cruelty.

Held, dismissing the appeal: it is incumbent on the appellant before he can succeed in the appeal, to show that the learned trial judge has erred in his assessment of the evidence or that he has misdirected himself or that for some other good reason the conclusion reached by him should be upset. In this case the appellant has failed to do so.

Case referred to:—

(1) *Gollins* v. *Gollins* [1963] 2 All E.R. 966.

FEDERAL COURT.

S.K. Lee for respondent/appellant.

G.S. Hill for the petitioner/respondent.

Cur. Adv. Vult.

Tan Ah Tah F.J. (delivering the judgment of the court): In this case a wife (hereinafter called the petitioner) presented a petition for